Filed 4/25/05 Gordon v. Sup. Ct. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

EMANUEL GORDON, dba MANNY GORDON TRADING, Petitioner, v. SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; ROBERT ("BOBBY") FREEDMAN,, Real Party in Interest.	B180554 (Los Angeles County Super. Ct. No. SC058849)

ORIGINAL PROCEEDINGS in mandate. Terry B. Friedman, Judge. Petition granted.

Lavely & Singer and William J. Briggs, II; Greines, Martin, Stein & Richland and Marc J. Poster and Jens B. Koepke for Petitioner.

No appearance for Respondent.

Law Offices of Henry I. Bushkin and Henry I. Bushkin and Jennifer Raphael Komsky for Real Party in Interest.

Emanuel Gordon, dba Manny Gordon Trading (petitioner and plaintiff in the underlying action), seeks a writ of mandate directing the trial court to vacate its January 13, 2005 order directing petitioner to pay Robert ("Bobby) Freedman (real party in interest and defendant in the underlying action) $499,156.00 plus interest in sanctions and directing petitioner to personally appear at a hearing set on an Order to Show Cause previously scheduled to have been held on January 26, 2005.

PROCEDURAL BACKGROUND

Petitioner, Emanuel Gordon, dba Manny Gordon Trading (hereafter Gordon or petitioner), consigned $6.6 million in diamonds and jewelry to Richard Maslan & Company, Inc. According to Gordon, Richard Maslan, the owner of Richard Maslan & Company (hereafter Maslan), converted the goods to his own use by pledging them as collateral to various pawnbrokers and other lenders, including real party in interest, Robert ("Bobby") Freedman (hereafter Freedman or real party in interest), for personal loans.[1]

Gordon filed suit against both Maslan and his corporation as well as a number of the lenders, including Freedman.[2] Gordon sought recovery of his jewelry or, in the alternative, monetary compensation.

In January 2000, Gordon filed a petition for writ of mandate directing the superior court to vacate its order denying his applications for writ of possession of merchandise and goods (gems and jewelry) in possession of the lenders. The petition was denied. It was determined Gordon had created his own predicament by failing to take the standard precaution of filing a financing statement pursuant to the Uniform Commercial Code.

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[1] The action against Freedman involves seven items of jewelry and diamonds that Maslan pawned with Freedman. The items were valued at approximately $1,430,000.00.

[2] On December 7, 2004, Freedman filed a cross-complaint against Gordon, Maslan and others.

A criminal action was filed against Maslan. In that case, Maslan was found guilty of eight counts of grand theft by embezzlement and he was sentenced to 16 months in prison. The judgment was affirmed on appeal in case No. B163967 [nonpub. opn.]. The trial court relied on the affirmed conviction to grant a number of the defendants' motions for summary adjudication.

In July 2004, this court filed *South Beverly Wilshire Jewelry & Loan v. Superior Court* (2004) 121 Cal.App.4th 74, a case regarding another defendant in Gordon's action.

The litigation continued. According to Gordon's declaration, on April 26, 2002, the trial court granted his application for a "pre-judgment right to attach order" and issuance of a writ of attachment against Freedman on jewelry and funds from the sale of jewelry which Maslan had pawned with Freedman. In the alternative, the court granted a pre-judgment attachment on $1,453,970.00, the value of the pawned items. Gordon indicated that, based on these orders and a private agreement between counsel, Freedman personally delivered to Gordon's daughter three items consisting of diamonds and diamond jewelry. On July 15, 2002, the trial court adopted the agreement between counsel and issued an order indicating, among other things, that Gordon was to keep the diamonds in his possession. Freedman asserts that, at some point in 2002, contrary to the arrangements made by counsel and the trial court's order, Gordon shipped the three items of jewelry to Hong Kong. Gordon claims his counsel failed to inform him of that portion of the agreement or the trial court's order indicating he was to keep the diamonds in his possession and he was thus unaware of it. In any event, Gordon indicated he did not ship the items in response to or in anticipation of a discovery request. At his deposition held on September 3, 2003, Gordon stated the diamonds and jewelry were in his safe in New York. Although he never produced the diamonds, Gordon later indicated that he did not ship them overseas until June 2004. Gordon stated, "As I previously set forth in my declaration, I understood that since the diamonds and jewelry had been voluntarily turned over to me based on a private agreement, I could ship them elsewhere as long as I was financially responsible for them should I not get the presumed judgment against Mr. Freedman."

However, apparently in response to the court's opinion in *South Beverly Wilshire Jewelry & Loan v. Superior Court, supra*, 121 Cal.App.4th 74, on September 15, 2004, the trial court issued the following order: "The Court's April 26, 2002 Order for Issuance of a Writ of Attachment in favor of . . . Emanuel Gordon and against Defendant Robert Freedman shall be and hereby is dissolved. Any and all property of Freedman attached pursuant to such order is hereby released and discharged."

At proceedings held on September 27, 2004, counsel for Freedman indicated that, in view of the trial court's dissolution of the writ of attachment in favor of Gordon, Freedman was entitled to have returned to him the diamonds and jewelry which had been delivered to Gordon. Counsel for Freedman asserted that "equity requires that [Freedman] get those items back." The trial court agreed that Freedman was entitled to possession of the jewels and indicated that, in issuing its September 15th order dissolving the writ of attachment, it had intended that Gordon return the diamonds to Freedman. The court then issued an "OSC re contempt for [Gordon's] failure to abide by that order . . . ."

At an October 6, 2004 hearing held on the OSC, it was determined that Gordon did not have the diamonds in question and had not had them since the trial court had issued its order directing Gordon to maintain possession of them. The trial court concluded that, since the jewels which were the subject of the OSC were not in Gordon's possession, an OSC re contempt to return the jewels could not be issued.

In December 2004, Freedman made a motion for terminating and/or contempt sanctions against Gordon pursuant to Code of Civil Procedure section 2023. The motion was based on the grounds that Gordon intentionally disposed of diamonds and jewelry that were the subject matter of a demand for production, that Gordon abused the discovery process by disposing of the diamonds and jewelry, that Gordon violated a 2002 court order requiring him to maintain and preserve the diamonds and that Gordon violated a stipulation entered into with Freedman in July 2002, by failing to retain possession of the diamonds and jewelry.

Following briefing and a hearing on the matter, the trial court issued the following tentative ruling, which read in part: "Over the last three months, for procedural and due process reasons, this Court has denied Defendant Freedman's consistent efforts to obtain a sanction for Gordon's wrongful conduct in this case. This Motion, finally, presents to the Court proper grounds for terminating and monetary sanctions. The Court finds that Gordon has willfully spoliated evidence and testified falsely in response to Freedman's discovery. Such conduct is so egregious that it warrants the ultimate sanction. [¶] The facts and court record material to this Motion begin on April 26, 2002, when this Court issued a Writ of Attachment against Freedman and in Gordon's favor in the amount of $1,453,970.00. In partial satisfaction of this Writ, Gordon and Freedman entered a Stipulation on July 11, 2002, providing that Freedman would turn over to Gordon three specified diamonds. Based on the Stipulation, on July 15, 2002, this Court ordered Freedman to turn over to Gordon the three diamonds, and further ordered that 'Gordon shall maintain possession of the foregoing described diamonds and jewelry during the pendency of this action between these two parties and shall not dispose of, sell, consign or pledge any of them while this action is pending between these two parties.' On September 3, 2003, Gordon testified in his deposition that all three diamonds at that time were locked in a safe in his New York office. Gordon failed to produce those diamonds at the deposition as Freedman demanded pursuant to Code of Civil Procedure [section] 2025(h)(1). On September 15, 2004, this Court dissolved the Writ of Attachment, releasing the diamonds. That same day, Freedman demanded that Gordon return the diamonds. When Gordon did not return the diamonds, Freedman noticed an Order to Show Cause. In response, Gordon filed a Declaration, dated October 4, 2004, in which he stated that he did not possess the diamonds because he had caused them to be shipped overseas. Gordon's counsel's October 4th brief in opposition to the OSC stated, in pertinent part: 'On July 11, 2002, Freedman's counsel . . . turned over possession of the diamonds and jewelry to Gordon's counsel and daughter. Approximately two months later, Gordon shipped the merchandise overseas.' [Citation.]"

The trial court continued, "Spoliation and false testimony in response to a discovery request may be the basis for a sanction pursuant to CCP 2023. [*Cedars-Sinai Medical Center v. Superior Court* (1998) 18 C4th 1, 12; *Penn v. Prestige Stations* (2000) 83 CA4th 336, 340-343]. Gordon now testifies in a new Declaration filed in opposition to this Motion, dated January 3, 2005, that he did not ship the diamonds overseas until June 2004. This is directly contrary to his counsel's October 4, 2004 brief, which stated that Gordon shipped the diamonds overseas . . . [in] approximately . . . September 2002. . . . [P]erhaps Gordon will produce credible documentary evidence corroborating his latest version of when he shipped the diamonds. . . . It stretches credulity that a businessman dealing in valuable jewels would ship diamonds of that value without some documentation. Under these circumstances, Gordon can hardly claim he did not willfully spoliate evidence and testify falsely. [¶] Freedman also seeks monetary sanctions against Gordon and his counsel in the amount of his attorneys' fees and costs incurred as a result of Gordon's discovery abuses. Freedman is entitled to monetary sanctions. [*Sherman v. Kinetic Concepts* (1998) 67 CA4th 1152, 1162-1163.]"

Following oral argument by the parties, the court "rule[d] as follows: Pursuant to Code of Civil Procedure 2023(b)(5),[**3**] the Court is imposing a contempt sanction in the amount of $499,156.00, which is the amount of the [value of the three] jewels according to the stipulation of the parties. [¶] On the Court's own Motion, the above-captioned Motion is continued to January 26, 2005, at 9:30 a.m. . . . [¶] An Order to Show Cause Re: Contempt Re: Spoliation of Evidence and False Testimony against Mr. Emanuel Gordon is set for hearing on January 26, 2005 at 9:30 a.m. . . . [¶] Plaintiff, Emanuel Gordon is ordered to appear on the next court date. [¶] Payment of the contempt sanctions is stayed until January 26, 2005. [¶] [Gordon's] request for an immediate stay

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3 Code of Civil Procedure section 2023, subdivision (b)(5) provides: "The court may impose a contempt sanction by an order treating the misuse of the discovery process as a contempt of court."

of payment of contempt sanctions to allow him an opportunity to take a writ with the appellate court is granted. . . ."

On January 21, 2005, Freedman made an ex parte application for the trial court to "correct ambiguity/clerical mistake nunc pro tunc in [its] January 13, 2005 minute order." Freedman asserted the trial court had omitted any reference to the payment of interest on the sanctions imposed. Following argument on the application, the trial court granted it. In its minute order, the court stated, "On January 13, 2005, the Court ruled as follows: [¶] Pursuant to Code of Civil Procedure 2023(b)(5), the Court is imposing a contempt sanction in the amount of $499,156.00 . . . . [¶] The above Order is amended nunc pro tunc as of January 13, 2005 to add the following: [¶] ADD: Interest is included."

Gordon filed the present petition on January 21, 2005. He asserts the trial court erred in ordering him to pay $499,156.00 plus interest in "contempt sanctions" and erred in ordering him to personally appear at the January 26, 2005 hearing to be held on the Order to Show Cause.

DISCUSSION

Initially, the respondent trial court erred when it awarded $499,156.00 plus interest in sanctions. In essence, by ordering petitioner to pay real party in interest, Freedman, $499,156.00 plus interest, the stipulated value of the diamonds involved in this matter, the trial court determined at least a portion of the substantive merits of this case. In making such an order, when there has not yet been a trial on the merits of the matter, the trial court exceeded its jurisdiction.

In general, "monetary discovery sanctions payable to the opposing party are limited to the opposing party's actual costs, including attorneys' fees." (*In re Marriage of Niklas* (1989) 211 Cal.App.3d 28, 37.) Pursuant to Code of Civil Procedure section 2023, subdivision (b)(1), discovery sanctions are limited to "reasonable expenses, including attorney's fees . . . ."

If one characterizes the sanctions imposed by the trial court as "contempt sanctions," the trial court's action is governed by Code of Civil Procedure section 1218, subdivision (a). That section provides that if one is found to have committed contempt,

"a fine may be imposed on him or her not exceeding one thousand dollars ($1,000), or he or she may be imprisoned not exceeding five days, or both. In addition, a person who is subject to a court order as a party to the action or any agent of this person, who is adjudged guilty of contempt for violating that court order may be ordered to pay to the party initiating the contempt proceeding the reasonable attorney's fees and costs incurred by this party in connection with the contempt proceeding."

Further, the trial court's January 13, 2005 order directing petitioner to appear in person at the hearing on the Order to Show Cause previously set for January 26, 2005, is invalid. " 'In civil proceedings . . . a party may appear in person or by counsel. Of course, in proper cases, he may be taken under attachment . . . ; and, within certain territorial limits, a person may be compelled to attend court as a witness by the process of subpoena.' " (*Morelli v. Superior Court* (1968) 262 Cal.App.2d 262, 269; see also *Silvagni v. Superior Court* (1958) 157 Cal.App.2d 287, 291.) In the present case, petitioner was "merely summoned to appear in court on a certain day, and show cause why a certain thing should not be done." (*Morelli v. Superior Court, supra,* 262 Cal.App.2d at p. 269.)

CONCLUSION

The trial court erred when it issued its January 13, 2005 order directing Gordon to pay Freedman $499,156.00 plus interest in sanctions and Gordon to appear in person at a hearing set on an Order to Show Cause scheduled to be heard on January 26, 2005.

DISPOSITION

Let a peremptory writ of mandate issue ordering the trial court to vacate its January 13, 2005 order directing petitioner, plaintiff in the underlying action, to pay to real party in interest, defendant in the underlying action, $499,156.00 plus interest in sanctions and petitioner to appear in person at a hearing to be held on an Order to Show Cause previously scheduled for January 26, 2005.

Each party is to bear its own costs.

The stay order entered by this court on January 25, 2005, is hereby lifted.

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CROSKEY, J.

We concur:

KLEIN, P.J.

KITCHING, J.